BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2007-255-C and 2007-256-C - ORDER NO. 2008-649

OCTOBER 22, 2008

IN RE:	Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast;	)	ORDER ON CONSOLIDATED DOCKETS
	and	)	
	Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast	)	

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the separate Petitions filed on June 28, 2007, by Nextel South Corp. ("Nextel South") and NPCR, Inc. ("Nextel Partners") (collectively, "Nextel") for adoption of the interconnection agreement between Sprint Communications Company L.P. ("Sprint CLEC") and Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS") (collectively "Sprint") and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast ("AT&T") (the "Sprint ICA"). The Commission

established Docket No. 2007-255-C to address the petition for approval of Nextel South and Docket No. 2007-256-C to address the petition for approval of Nextel Partners.

In its Petitions, Nextel seeks to adopt the Sprint ICA pursuant to both 47 U.S.C. Section 252(i) ("Section 252(i)") and Merger Commitment Nos. 1 and 2 under the heading "Reducing Transaction Costs Associated with Interconnection Agreements" found in Appendix F of the Federal Communications Commission's ("FCC") AT&T-BellSouth Merger Order.[1] The Parties have stipulated that when AT&T South Carolina, Sprint CLEC, and Sprint PCS initially negotiated and entered into the Sprint ICA, neither Sprint CLEC nor Sprint PCS had any affiliation with Nextel, and Nextel had no affiliation with either Sprint CLEC or Sprint PCS. As a result of the Sprint-Nextel merger, the Sprint parties to the original Sprint ICA and Nextel are now affiliated with one another.

For its part, AT&T argues that judicial economy, uniformity, and certainty are all best served by letting the FCC decide if the Merger Commitments upon which Nextel relies allow it to adopt the Sprint ICA when, in the view of AT&T, Section 251(i) of the Telecommunications Act of 1996 does not.AT&T argues that the FCC has exclusive jurisdiction over interpretation of the merger agreement.

AT&T further asserts that Nextel, as a stand-alone wireless provider, is not entitled to adopt the agreement which AT&T South Carolina entered into with Sprint, which was, at the time the agreement was entered, collectively comprised of both a

[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, at Appendix F, p. 149, "Reducing Transaction Costs Associated with Interconnection Agreements" ¶ 1 and 2, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*Merger Order*").

wireless provider and a wireline provider. AT&T contends that Nextel is not seeking to adopt the Sprint ICA "upon the same terms and conditions" pursuant to Section 252(i) because the Sprint ICA addresses a unique mix of wireline and wireless items, and Nextel provides only wireless services. AT&T maintains that the Sprint interconnection agreement contains terms to which AT&T would not have agreed if it had been dealing only with a stand-alone wireless company like Nextel.

Moreover, AT&T argues that nothing prohibits Nextel, the Sprint parties to the Sprint ICA, and other affiliated companies from collectively seeking to negotiate a new and mutually-acceptable interconnection agreement with AT&T South Carolina. The Sprint ICA provides that "[s]hould either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with [AT&T South Carolina] pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between [AT&T South Carolina] and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by [AT&T South Carolina]."[2]

On August 10, 2007, AT&T filed a Motion to Dismiss and, In the Alternative, Answer ("Motion/Answer") in each docket, and Nextel filed its Response to the Motion/Answer on August 20, 2007. The Commission held AT&T's Motion to Dismiss in abeyance and ordered the parties to proceed with the hearing on the merits of the case "in order to make a fully reasoned determination in this case."[3] On September 12, 2007, Nextel filed a Motion to Consolidate. On October 9, 2007, the Commission consolidated

[2] Sprint ICA, Attachment 3, Section 6.1.

[3] *See* Order Holding Motion to Dismiss in Abeyance, Order No. 2007-622 in Docket Nos. 2007-255-C and 2007-256-C (September 13, 2007).

the proceedings for consideration and resolution. Thereafter, between October 16, 2007, and November 13, 2007, testimony was filed by Nextel witness Mark G. Felton and AT&T witness P. L. (Scot) Ferguson.

On December 7, 2007, in the separately pending arbitration Docket No. 2007-215-C proceeding between Sprint and AT&T regarding the extension of the Sprint ICA, Sprint and AT&T filed a Joint Motion for approval of an amendment to the Sprint ICA that extended the term of the Sprint ICA for a period of three years as originally requested by Sprint.[4] On January 23, 2008, the Commission approved the amendment to the Sprint ICA, which in fact extended the then-effective month-to-month term of the Sprint ICA for three years from March 20, 2007, to March 19, 2010, and closed the Sprint-AT&T Arbitration Docket No. 2007-215-C.[5]

On February 8, 2008, Nextel and AT&T filed a Joint Procedural Motion (the "Joint Motion"), requesting that the Commission allow the parties to brief and argue the issues presented in the consolidated Dockets in lieu of holding an evidentiary hearing. On February 20, 2008, the Commission entered its Order on Procedural Motion[6] granting the Joint Motion and ruled that it will decide the issues presented in these consolidated dockets on the basis of the identified Formal Record. The Formal Record includes the parties' filed Stipulations of Fact, each party's respectively filed pleadings and exhibits, the testimony and exhibits the parties have prefiled in these consolidated dockets, the

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[4] *See* "Joint Motion to Approve Amendment", Sprint-AT&T Arbitration Docket No. 2007-215-C, ¶2 (Dec. 7, 2007) ("*Joint Motion*").

[5] "Order Approving Amendment to Interconnection Agreement", Order No. 2008-27 in Docket No. 2007-215-C (January 23, 2008).

[6] *See* Order on Procedural Motion, Order No. 2008-120 in Docket Nos. 2007-255-C and 2007-256-C (February 20, 2008).

interconnection agreement for which Nextel seeks adoption, and such publicly available information of which the Commission appropriately may take notice pursuant to applicable statutes, rules or regulations.

Oral Arguments in this matter were held on April 9, 2008. Sprint was represented by John J. Pringle, Jr., Esquire, and William. R. L. Atkinson, Esquire. AT&T was represented by Patrick W. Turner, Esquire, and John T. Tyler, Esquire. The Office of Regulatory Staff ("ORS") was represented by Nanette Edwards, Esquire. The Commission gave the parties the opportunity to submit Proposed Orders. We have carefully reviewed these submissions, the evidence of record as stipulated by the parties, and the controlling law, and this Order sets forth our rulings on AT&T's Motion to Dismiss, and the request Nextel submitted in its Petitions.

II. LEGAL STANDARDS UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

Section 252(i) of the Federal Telecommunications Act of 1996 states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. 252(i).

The federal regulation implementing Section 252(i) states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

> An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
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> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

47 C.F.R. § 51.809.

III. DISCUSSION

A. AT&T SOUTH CAROLINA'S MOTION TO DISMISS

AT&T argues[7] that the Federal Communications Commission ("FCC") has exclusive jurisdiction over the Merger Commitments adopted and approved by the FCC in the Merger Order. Specifically, AT&T asserts that "the question of whether these federal merger commitments (that were presented to and approved by the FCC) support Nextel's claims is a question that is within the exclusive jurisdiction of the FCC."[8] We

[7] AT&T withdrew two additional arguments contained in its filed Motion to Dismiss. *See* Ferguson Direct at p. 18, ll. 7-17, and statement of John Tyler at Oral Argument, Tr. at page 60.

[8] Motion/Answer, Page 3.

disagree, and our previous ruling on the topic in Docket No. 2007-215-C makes clear that the Commission has concurrent jurisdiction with the FCC over the Merger Commitments.[9] We believe, as did the Kentucky Public Service Commission[10], that approval of Nextel's adoption requests would be appropriate under the Merger Commitment No. 1, and that Section 252(i) also mandates the relief sought by Nextel. AT&T's Motion to Dismiss is therefore denied.

B. ADOPTION OF THE SPRINT AGREEMENT UNDER SECTION 252(i) AND 47 C.F.R. § 51.809(a)

Nextel asserts that approval of its adoption of the Sprint ICA is appropriate under Section 252(i) and 47 C.F.R. § 51.809(a), *supra*.

AT&T is a "local exchange carrier" and an "incumbent LEC" as those terms are used in Section 252(i) and 47 C.F.R. § 51.809(a). The Sprint ICA has been approved by the Commission pursuant to Section 252(i) of the Act. Furthermore, the parties do not dispute that each of the Nextel entities is a "requesting telecommunications carrier" under these provisions.

AT&T's position is that Nextel is a stand-alone wireless carrier that is not in the same position to AT&T as were Sprint CLEC and Sprint PCS when they negotiated the

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[9] *See* "Order Ruling on Arbitration", Order No. 2007-683 in Docket No. 2007-215-C (October 5, 2007).

[10] *See In the Matter of Adoption by Nextel West Corp. of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.* and *In the Matter of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.*, Orders issued December 18, 2007, Case Nos. 2007-00255 and 2007-00256 (granting Nextel's requests to adopt the Sprint-BellSouth ICA and denying AT&T's Motions to Dismiss) (the "Kentucky Adoption Order"); Kentucky Public Service Commission Orders issued February 18, 2008, Case Nos. 2007-00255 and 2007-00256 (denying AT&T Kentucky's Motions for Reconsideration) (the "Kentucky Reconsideration Order").

Sprint ICA.[11] AT&T's attempt to limit Nextel's adoption of the Sprint ICA is contrary to the express provisions of 47 C.F.R. § 51.809(a), and is a discriminatory practice that has been rejected by not only the FCC and the courts, but also the Kentucky PSC in the context of Nextel's request to adopt the Sprint ICA.

In July of 2004, the FCC revisited its interpretation of Section 252(i) to reconsider and eliminate what was originally known as its "pick-and-choose" rule, which permitted requesting carriers to select only the related terms that they desired from an incumbent LEC's existing filed interconnection agreements, rather than an entire interconnection agreement. The FCC eliminated the "pick-and-choose" rule and replaced it with the "all-or-nothing" rule. The FCC concluded that the original purpose of Section 252(i), protecting requesting carriers from discrimination, continued to be served by the all-or nothing rule:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[12]

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[11] *See Ferguson Surrebuttal* at p. 3, l. 3-14.

[12] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No.01-338, Second Report and Order, 19 FCC Rcd, 13494 at ¶ 19 (2004) ("*Second Report and Order*").

The FCC recognizes that the primary purpose of the Section 252(i) adoption process has been to ensure that an ILEC does not discriminate in favor of any particular carriers,[13] and that a carrier seeking to adopt an existing ICA under Section 252(i) "shall be permitted to obtain its statutory rights on an expedited basis."[14] Where a LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the Commission that such differential treatment is justified – which as set out below AT&T has not attempted to do. The fact a carrier serves a different class of customers, or provides a different type of service, does not bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible.[15]

We believe that the clear intent of the agreement in question was that it would apply only to a situation where both a CLEC and wireless carrier would be parties to the agreement with AT&T. Further, we are inclined to be sympathetic to AT&T's arguments in this case. However the case law, the intent of the federal regulations and the Telecommunications Act of 1996 leave us no choice but to find for Nextel.

Based on the FCC's *Second Report and Order*, we conclude that AT&T cannot prevent Nextel's adoption of the Sprint ICA. Like the FCC and the Kentucky Commission, we believe that the adoption process should be simple and expedient, and we reject AT&T's arguments because of the clear prohibition against discriminatory

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13 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd, 15499, 16139 at ¶ 1315 (1996) ("*Local Competition Order*").

14 *Id.* at ¶ 1321.

15 *Id.* at ¶ 1318.

practices found in Section 252(i).

AT&T further argues that Nextel's adoption of the Sprint ICA could be internally inconsistent and appear to violate the FCC's *TRRO* prohibition against using unbundled network elements ("UNEs") for the exclusive provision of mobile wireless service. By virtue of the April 2006 *TRRO Amendment* to the Sprint ICA, Sprint and AT&T completely replaced Attachment 2 regarding the provisioning of UNEs (which are short-hand referenced in Attachment 2 as "Network Elements", *see* Attachment 2, § 1.1).[16] As a result of that Amendment, Attachment 2, § 1.5 specifically prohibits both Sprint CLEC and Sprint PCS from obtaining UNEs for wireless only purposes, expressly stating: "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." Thus, consistent with the *TRRO*, just as the Sprint ICA already precludes *either* Sprint CLEC or Sprint PCS from obtaining UNEs for the exclusive use of Sprint PCS wireless-only services, the Sprint ICA would likewise preclude Nextel from obtaining UNEs for such Nextel wireless-only purposes. There simply is no dispute between the parties regarding the unavailability of UNEs for the exclusive provision of wireless service under the Sprint ICA.[17] Therefore, AT&T's position does not provide a basis for the Commission to deny Nextel's request under Section 252(i).

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[16] *See* Sprint ICA at pages "CCCS 873 of 1169"-"CCCS 1165 of 1169" and *Ferguson Direct* Exhibit PLF-5 which reflects pages "CCS 873 of 1169"-"CCCS 882 of 1169" of the April, 2006 *TRRO Amendment*.

[17] *Felton Rebuttal* at p. 11, l. 13 - p. 12, line 3.

C. THE APPLICATION OF 47 C.F.R. § 51.809(b)

In order to refuse Nextel's request to adopt the Sprint ICA, AT&T must prove to the Commission that one of the subparts of 47 C.F.R. § 51.809(b) applies. That provision states that:

> (b) the obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) the provision of a particular agreement to the requesting carrier is not technically feasible.

AT&T's submissions to the Commission contain no allegation or inference that providing the Sprint ICA to Nextel is "not technically feasible." Therefore AT&T cannot refuse to make the Sprint ICA available based upon 47 C.F.R. § 51.809(b)(2).

Likewise, AT&T's pleadings and testimony contain no allegation or evidence that pursuant to 47 C.F.R. § 51.809(b)(1) its costs of providing the Sprint ICA to Nextel are greater than the costs of providing that agreement to the Sprint entities. Counsel for AT&T affirmatively conceded at Oral Argument that AT&T had not undertaken the cost analysis required by the rule: "we do not have on the record anything regarding specific costs in your state." Oral Argument Tr., at Page 69. Therefore, AT&T has failed to satisfy its burden under 47 C.F.R. § 51.809(b)(1).

The Commission is mindful of the arguments contained in AT&T's Brief that allowing Nextel's adoption of the Sprint ICA may "make AT&T South Carolina's costs

of providing the Sprint ICA to such adopting carriers greater than AT&T South Carolina's costs of providing the Sprint ICA to the original parties to that agreement." (AT&T Brief at Page 9). However, AT&T's legal arguments, without factual and evidentiary proof of higher costs, cannot form a basis for a ruling from this Commission that AT&T has met its burden of proof under 47 C.F.R. § 51.809(b)(1). *See, e.g. Eddy v. Waffle House*, 482 F.3d 674 (4th Cir. 2007). Moreover, even if the Commission could consider AT&T's argument as evidence, the rule requires that AT&T prove that its costs for providing the Sprint ICA agreement *to Nextel* are higher. By contrast, AT&T argues that the cost of providing the Sprint ICA to those carriers it speculates might adopt the Sprint ICA (not Nextel) would be higher. AT&T's argument does not address its costs of providing the Sprint ICA to Nextel, and could not satisfy the plain language of 47 C.F.R. §51.809(b)(1) even had it been supported by evidence.

For the foregoing reasons, the Commission adopts Nextel's positions and requires AT&T to execute Nextel's proposed adoption Amendment pursuant to Section 252(i).

D. AT&T'S RIGHT TO RENEGOTIATE THE SPRINT ICA

Our examination of the Sprint ICA leads to a different conclusion than that advocated by either of the parties. Both parties cited Attachment 3, Section 6.1 of the Sprint Agreement. We do not find this section relevant to the issue of adoption of the agreement, but we do believe that under the circumstances presented here, it allows AT&T to seek renegotiation of the agreement. The relevant language states:

> Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between BellSouth and the

> remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.

Attachment 3, Section 6.1. We find that this language provides AT&T the opportunity to renegotiate the terms of the ICA.

IV. CONCLUSION

We find that Nextel's request for this Commission to approve Nextel's adoption of the Sprint-AT&T agreement is, on multiple, yet independent bases, consistent with federal law. We further find, however, that the differences between the original and the present Nextel entities give rise to AT&T's right to renegotiate the terms of the agreement.

IT IS THEREFORE ORDERED THAT:

a. AT&T's Motion to dismiss Nextel's Petitions is denied;

b. Pursuant to Section 252(i) of the Act and the Merger Commitments, the Nextel entities are entitled to adopt the Agreement; and

c. AT&T may, pursuant to Attachment 3, Section 6.1 of the Agreement, renegotiate the terms of the Agreement.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Elizabeth B. Fleming, Chairman

ATTEST:

John E. Howard, Vice Chairman

(SEAL)